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IN THE SUPREME COURT OF THE UNITED STATES

October term, 1988

No. 87-211

CHARLES J. BLACK, Petitioner

vs.

DARWIN JAY ROBINSON, Respondent

ON A PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

SUBMITTED BY:

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REASONS WHY THE PETITION SHOULD BE DENIED

1. THE EIGHTH CIRCUIT CORRECTLY DECIDED THE ISSUE BELOW WHEN IT APPLIED THE PRINCIPLES OF ANDERS V. CALIFORNIA, 386 U.S. 738 (1967), TO DETERMINE THE INADEQUACY OF RESPONDENT'S APPOINTED APPELLATE COUNSEL'S WITHDRAWAL BRIEF.

This Court has long held Anders as the controlling authority for articulating the responsibilities of a court-appointed appellate counsel who concludes an appeal is frivolous. Counsel may request the court's permission to withdraw if after a "conscientious examination" finds the client's appeal to be without merit. "That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id. at 744. This is known as the "Anders brief."

In McCoy v. Court of Appeals of Wisconsin, 108 S. Ct. 1895 (1988), this Court again endorsed the Anders brief and the objectives it serves.

> In Anders we held that a motion to withdraw must be accompanied by `a brief referring to anything in the record that might arguably support the appeal.' [Citations omitted] That requirement was designed to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their client's appeals to the best of their ability. The Anders requirement assures that indigent defendants have the benefit of what wealthy defendants are able to acquire by purchase--a diligent and thorough search of the record and an identification of any arguable issues revealed by that review. Thus, the Anders brief assists the Court in making the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw.

Id. at 1902.

After McCoy, the purpose of an Anders brief is clear. Anders requires an appointed appellate counsel to be an advocate for his client until relieved of his duties by the court; to protect the client's constitutional rights by conducting a thorough search of the record; to assist the court in deciding if the appeal is without merit.

Consistent with the principles of Anders and in light of this Court's decision in McCoy, the Eighth Circuit properly found the brief submitted by Robinson's counsel deficient "even though [the brief] identifie[d] and extensively analyze[d] all issues possibly raised on appeal." Brief for Petitioner at 7. Admittedly appointed counsel in this case did not submit a "one-paragraph `no-merit'letter" prohibited by Anders; on the other hand, it is clear counsel did not meet the

minimum requirements of Anders. Brief for Petitioner at 6.

Here, as in Anders, counsel's brief in support of his motion to withdraw failed to allow the court to decide whether the appeal was without merit. Moreover, counsel did not act as an advocate "when he briefed all issues in favor of the government." Brief for Petitioner, Appendix B at 7.

> Robinson had a right to expect counsel to brief and argue his case to the best of counsel's ability, showing the most favorable side of the defendant's arguments. Counsel changed the adversarial process into an inquisitorial one by joining the forces of the state and working against his client.

Brief for Petitioner, Appendix B at 7-8.

After this Court's opinion in McCoy, there is no longer any uncertainty about court-appointed counsel's responsibilities under Anders. The McCoy opinion clearly outlines the minimum requirements and fully explains the objectives of the Anders brief. Id. at 1902, 1903-1904.

Despite McCoy settling the controversy as to counsel's responsibilities under Anders, the different results among the circuits cannot be eliminated regarding the substance of withdrawal briefs. The results will vary, because the sufficiency of a withdrawal brief is fact dependent.

No decision by this Court will eliminate the divergent conclusions by the several circuits applying Anders standards to a withdrawal brief. Each case must be decided on its own particular facts, including whether appellate counsel was retained or appointed, whether the appellate counsel submitted a withdrawal brief, the content of that brief and the circuit or state court rule in effect.

For example, in Suggs v. United States 391 F.2d 971 (D.C. Cir. 1968), the appellate counsel failed to act as an advocate for his client when he briefed all issues on the side of the government. In Nell v. James, 811 F. 2d 100 (2nd Cir. 1987), the brief submitted by counsel "contains no indication of an independent examination of the record." Id. at 104. In United States v. Edwards, 777 F.2d 364 (7th Cir. 1985), counsel submitted a one-page brief stating his conclusion, without explanation, that the appeal was meritless. In Freels v. Hills, 843 F.2d 958 (6th Cir. 1988), counsel failed to act as an

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advocate when he filed a four-page brief containing the procedural history and a conclusion that the trial court did not err.

McCoy embraces Anders as setting forth the responsibilities for appointed appellate counsel who may find the appeal without merit. This Court need go no further. The several circuits are bound to recognize and follow the standards enunciated in McCoy and Anders. Yet the circuits need not be concerned with different results upon applying those standards to a particular fact situation.

Similarly, the decision below is a factual question. The inadequacy of the Anders brief filed by Robinson's appointed appellate counsel turns upon the facts peculiar to this case. This Court held in NLRB v. Waterman S.S. Corp., 309 U.S. 208, reh'g denied 309 U.S. 696 (1940), "We do not ordinarily grant certiorari to review judgments based solely on questions of fact." No important national issue is at stake and a decision by this Court will affect few others than the litigants.

2. THE DECISION BY THE EIGHTH CIRCUIT COURT OF APPEALS DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

The Question Presented in the petition is whether the standards enunciated in Strickland v. Washington, 466 U.S. 668 (1984) are also applicable to judging the performance of appellate counsel. The Eighth Circuit was not obligated to apply the Strickland actual prejudice standard because Anders is the proper standard of review in the context of a withdrawal brief. When counsel's withdrawal brief fails to meet the minimum requirements of Anders, the indigent defendant is effectively denied assistance of an advocate and the right to an appeal on the merits.

It is imperative for this Court to continue to recognize separate standards of review for ineffective assistance of counsel. When a defendant's appellate counsel renders continual representation in the appeal process, yet the performance is substandard, that is a totally different situation from the appellate counsel, who finds the appeal frivolous, then abandons his client by withdrawing.

The Strickland two-prong test is appropriate for those situations where the defendant was represented during the adversarial process, but the representation was inadequate and the results of the proceeding are unreliable. Id. at 686. Here, to sustain a Sixth Amendment claim for ineffective assistance of counsel, the defendant must prove the attorney's performance was deficient and the deficient performance prejudiced the outcome. Id. at 687.

Anders controls the standard of review when an appointed appellate counsel decides the appeal is without merit and wishes to withdraw. Certainly, in this situation, an indigent defendant cannot be required to prove Strickland requirements. If counsel has withdrawn, the defendant is without representation in the adversarial proceeding and could never prove the deficit performance requirement of Strickland.

Anders requires the appellate counsel to submit a brief in support of a motion to withdraw. In that brief, if counsel does not remain an advocate, the defendant is without effective representation and is no better off than a defendant with no counsel. Evitts v. Lucey, 469 U.S. 387, 396. Unless the withdrawal brief meets the minimum requirements of Anders, the appointed appellate counsel has deprived the indigent defendant of his Sixth Amendment right to counsel.

According to Strickland, a court is not compelled to sustain an action for ineffective assistance of counsel merely because counsel's conduct is deficient. Nonetheless, it does recognize that:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.

Id. at 692.

The application of the Strickland actual prejudice standard to an Anders brief is unwarranted. Because an insufficient Anders brief denies assistance of counsel, actual prejudice is presumed.

Precisely the same issue raised by the Petition was presented before the Sixth Circuit in Freels v. Hills.

> [W]hether the deficient counsel standard set forth in Strickland can be applied to excuse the failure of court-appointed counsel to comply with the more specific commands of Anders.

843 F.2d 958, 963 (6th Cir. 1988).

Recognizing the inherent prejudicial affect of an insufficient Anders brief upon an indigent defendant's Sixth Amendment rights, the court held an attorney's failure to remain an advocate presumptively impairs the reliability of the outcome. Id. at 964.

Although the Eighth Circuit opinion is consistent with the principals of Anders, both the Fifth and the Tenth Circuits have articulated the need for the Strickland actual prejudice standard before a Sixth Amendment claim for ineffective assistance of appellate counsel can be sustained. However, neither of those circuit courts decided an Anders brief was required to be filed.

A short review of these cases clearly shows how inapposite they are. In Griffin v. West, 791 F.2d 1578 (10th Cir. 1986), counsel filed a notice of appeal, but did not file a brief. The attorney apprised the client of the intent not to file. Because Griffin's attorney was retained, not appointed, the court held Strickland standards as applicable. Id. at 1582.

In Lockhart v. McCotter, 782 F.2d 1275 (5th Cir. 1986), cert. denied 107 S.C. 873, reh'g denied 107 S.C. 1360, (1987) the defendant claimed he had ineffective assistance of counsel when appellate counsel filed an "affidavit of counsel" concluding the appeal as frivolous. The court found counsel's assistance to be deficient, but Lockhart failed to prove he was prejudiced by counsel's conduct. Again, as in Griffin, the attorney did not request permission to withdraw and consequently was not required to file an Anders brief.

Anders controls the standard of review for ineffective assistance of counsel in the withdrawal brief context. The application of Strickland standards to an appointed appellate counsel's withdrawal brief is unnecessary, superfluous and will cloud the distinctions thus far enunciated by this Court. When the mandates of Anders are not met, counsel's conduct is presumptively prejudicial to an indigent defendant.

The Petition has raised an issue that was not before the Eighth Circuit. The application of Strickland standards to a withdrawal brief was not the focus of the Eighth Circuit's opinion. Nothing can be

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accomplished by introducing an entirely new issue in this case. To obfuscate the real Anders issue is to deny Robinson the relief he has fought so hard to obtain, and did in the Eighth Circuit. Therefore, it is not an issue to be decided by this Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied. Respondent urges that the decision of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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